

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FERNANDO ORTIZ and U.S. POSTAL SERVICE,
POST OFFICE, San Juan, PR

*Docket No. 97-2632; Submitted on the Record;
Issued December 28, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual wages in the position of modified jeep mechanic fairly and reasonably represented his wage-earning capacity, and therefore reduced his compensation to zero; (2) whether the Office abused its discretion by denying appellant's request for a hearing under 5 U.S.C. § 8124 on the grounds that it was untimely requested; and (3) whether the Office abused its discretion by denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128.

On September 10, 1992 appellant, then a 42-year-old junior mechanic, sustained sharp lumbar spine back pain as he was working on a vehicle. On September 21, 1992 an employing establishment health unit physician diagnosed lumbar myositis and indicated that appellant could return to limited duty that date with intermittent lifting and carrying of no more than 20 pounds, intermittent sitting, standing, walking and stair climbing and intermittent twisting pushing/pulling, simple grasping and fine manipulation.

On September 22, 1992 the employing establishment offered appellant a limited-duty job in accordance with his work restrictions, which consisted of procuring parts, shuttling vehicles, helping the analyst perform inspections and fueling vehicles. Appellant accepted this position and returned to work.

Subsequent computerized tomography (CT) scanning on November 2, 1992 demonstrated an L5-S1 chronic central posterior herniation indenting the thecal sac, posterior marginal spurs, degenerative joint disease in the facet joints and a partially narrowed left neural foramen, and an L4-5 posterior annulus bulge versus minimal central herniation indenting the thecal sac. On November 12, 1992 the employing establishment medical officer indicated that appellant was working eight hours a day, five days a week and he specified time limits for each activity.

On October 5, 1993 Dr. Luis E. Faura, a Board-certified physical medicine and rehabilitation specialist, completed a Form CA-17 and noted a diagnosis due to injury as lumbar radiculopathy. Dr. Faura indicated that appellant could return to work that date, and noted work restrictions.

On March 2, 1994 the Office accepted that appellant sustained lumbosacral strain; concurrent conditions not due to the injury were noted to include lumbar arthritis, arterial hypertension and herniated nucleus pulposus at L4-5 and L5-S1.

A magnetic resonance imaging (MRI) scan on July 26, 1994 demonstrated a moderate herniated disc at L4-5, centrally and to the right, a small herniated disc at L5-S1 to the left, and disc dessication at both L4-5 and L5-S1. On September 13, 1994 Dr. Faura restated appellant's work activity restrictions based upon the diagnosis of herniated nucleus pulposus L4-5, L5-S1. In a subsequent narrative report Dr. Faura restated appellant's herniated discs diagnosis and opined that he should continue on limited duty permanently. However, a March 10, 1995 CT scan was reported as demonstrating bulging discs at L3-4, L4-5 and L5-S1 without herniated nucleus pulposii being identified. Spondyloarthritic spinal changes were also noted.

Appellant sustained a recurrence of disability on June 18, 1995 which was accepted by the Office and returned to working limited duty on June 26, 1995. In an undated report received by the Office on September 27, 1995, Dr. Faura diagnosed dessicated herniated nucleus pulposus at L4-5 and L5-S1, and opined that "the findings come as a direct consequence of his injury on September 10, 1992." He recommended permanent limited duties. On October 23, 1995 Dr. Faura revised appellant's work restrictions to a four-hour workday.

Appellant, however, ceased work again on January 9, 1996 and did not return. A contract nurse, on behalf of the Office claims examiner and on Office letterhead, advised Dr. Faura that, as of January 9, 1996, appellant had not been able to fulfill his limited job requirements. On February 13, 1996 he noted that electromyography demonstrated bilateral L4-5 radiculopathies. On March 25, 1996 Dr. Faura recommended retirement, based upon the herniated discs diagnosis. On June 3, 1996 Dr. Faura completed an OWCP-5c form stating that appellant "cannot and will not work ever again."

On October 15, 1996 the Office referred appellant for a second opinion evaluation to Dr. Francisco Carlos, a Board-certified orthopedic surgeon, with a statement of accepted facts and questions to be answered regarding appellant's accepted condition of lumbosacral strain.¹

By report dated December 18, 1996, Dr. Carlos reviewed appellant's history, reported examination results, diagnosed herniated discs of L4-5 and L5-S1 with radicular symptoms, facet osteoarthritic changes, facet degenerative joint disease, L4-5 radiculopathy, mild peroneal neuropathy secondary to diabetes and tarsal tunnel syndrome. He did not diagnose or comment upon the status of appellant's accepted condition of lumbosacral strain, or answer the questions posed by the Office. Dr. Carlos opined that appellant had a low back pain syndrome that was chronic, and opined that appellant should be permanently separated from his job. He stated that, if appellant underwent vocational rehabilitation, he might be able to do sedentary work, but noted, incorrectly, that since he had been out of work since 1992 he was not very focused on returning to work.

By letter to the employing establishment dated February 20, 1997, the Office requested information regarding appellant's grade and step and annual pay rate at that time. By response dated February 26, 1997, the employing establishment stated that appellant was a grade 5 step 1 making \$36,551.00 annually. The employing establishment did not actually confirm that appellant was currently employed with them and actively working there at that time.

By decision dated March 3, 1997, the Office determined that appellant had no loss in wage-earning capacity, noting that he had satisfactorily performed the duties of the attached September 22, 1992 modified jeep mechanic position, and it determined that that position fairly and reasonably represented his wage-earning capacity.

On March 17, 1997 the Office received another Form CA-17 from Dr. Faura noting that appellant was and would remain totally and permanently disabled to perform any job duties. An MRI scan from November 21, 1996 was also submitted which diagnosed diffuse bulges at L4-5 and L5-S1 with hypertrophic changes of the facet joints and lateral recess narrowing.

By letter dated April 29, 1997, appellant, through his representative, requested a hearing on the wage-earning capacity determination and submitted new medical evidence.

By decision dated June 11, 1997, the Office denied appellant's request finding that it was untimely, and that the issue could be addressed by submitting new evidence with a request for reconsideration.

¹ Notice of this appointment was mailed to appellant at an incomplete address. The notice was mailed to appellant at "Calle 3, Sec 2, Casa L, Doraville, Dorado, P.R. 00646, but the record reveals that appellant's complete address is: "Calle 3, Seccion 2, Casa 6, Bloque 4, Doraville, Dorado, P.R. 00646." Appellant did not attend the October 28, 1996 scheduled appointment. By letter dated November 5, 1996, the Office advised appellant that his failure to attend the scheduled examination could be considered to be obstruction and it gave him 14 days within which to explain his noncompliance, before his compensation entitlement would be suspended. On November 18, 1996 appellant called the Office to advise that he did not receive the letter for the October 28, 1996 appointment. On November 21, 1996 the Office received a letter from appellant restating that the original letter had had an incomplete address and providing the correct address. By letter to appellant at the correct address dated December 9, 1996, the Office rescheduled appellant's second opinion appointment for December 16, 1996.

By letter dated June 26, 1997, appellant requested reconsideration and resubmitted the new evidence.

By decision dated July 22, 1997, the Office denied appellant's request for reconsideration on the merits, finding that his request neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that the Office did not properly determine appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.² The Office did not meet its burden in this case.

In the present case, the Office, in its March 3, 1997 decision, based appellant's loss of wage-earning capacity on a determination that his actual earnings as a modified mechanic at the employing establishment beginning September 22, 1992 represented his wage-earning capacity.³ The Office's Federal (FECA) Procedure Manual states that, after a claimant has been working for 60 days, the claims examiner will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity.⁴ It goes on to state, however, that, if so, a formal decision should be issued no later than 90 days after the date of return to work. In this case, appellant returned to modified limited duty on September 22, 1992, had his work restrictions modified on October 5, 1993 and September 13, 1994, sustained a recurrence of disability on June 18, 1995, had his work restrictions again modified on September 27, 1995 and on October 23, 1995 when he was limited to four hours of duty per day and ceased work entirely for medical reasons on January 9, 1996. Therefore, there is substantial evidence of record which indicates that at the time of the determination, almost five years after he began limited duty, and 14 months after he ceased work entirely, appellant was not working and therefore had no actual earnings.

Further, the Board notes that the weight of the medical evidence of record does not support that, as of March 3, 1997, appellant was physically able to work, as appellant's physician, Dr. Faura opined that he was totally and permanently disabled, and as the Office second opinion physician, Dr. Carlos, was unresponsive to the Office's questions regarding the status of appellant's accepted condition of lumbosacral strain or whether it or its residuals presently disabled appellant partially or totally from his modified mechanic position.

² *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

³ Section 8115 of the FECA provides that the wage-earning capacity of an employee is determined by his actual earnings if actual earnings fairly and reasonably represent his or her wage-earning capacity. Generally wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure. See *Radames Delgado-Serrano*, 47 ECAB 650 (1996); *Michael E. Moravec*, 46 ECAB 492 (1995).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1).

As the Office did not establish by the weight of the medical opinion evidence of record that appellant was partially disabled and was physically able to perform the job of modified mechanic at the time of his wage-earning capacity determination or within the preceding 90 days, and as the Office did not establish that appellant had actual wages or was actually performing the duties of modified mechanic at the time of the wage-earning capacity determination or within the preceding 90 days, his “actual wages” at that time do not fairly and reasonably represent his wage-earning capacity, such that the March 3, 1997 decision must be reversed.

As the Board is making this disposition regarding the March 3, 1997 Office decision, the issued of denial of a hearing and denial of merit review become moot.

The decision of the Office of Workers’ Compensation Programs dated March 3, 1997 is hereby reversed.

Dated, Washington, D.C.
December 28, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member